STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAVID MICHAEL POOLE,

Defendant-Appellant.

UNPUBLISHED
October 12, 2006

No. 262107
Wayne Circuit Court
LC No. 04-012892-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 216 months' to 40 years' imprisonment for his second-degree murder conviction, and two years in prison for his felony-firearm conviction. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

Defendant's conviction stems from the shooting death of Melanie Hill on December 12, 2004. Testimony at trial showed that defendant and Hill had been involved in a romantic relationship since August 2004. On the night in question, Hill's roommate heard defendant and Hill arguing in a bedroom, then heard a gunshot, and observed defendant walk out of the bedroom, shut the door slowly, and leave the house through the front door. Johnson went into the bedroom and found Hill lying in a pool of blood. Johnson called 911 and provided defendant's name and address and a description of defendant. Police apprehended defendant near his residence with a spent shotgun shell in his pocket. Forensic tests revealed gunshot residue on both defendant's hands and face. Hill died from a single gunshot wound to the head. The jury convicted defendant as charged and he now appeals his convictions as of right.

Defendant argues that the trial court erred when it failed to suppress Phyllis Johnson's testimony that Hill told defendant that she was seeing someone else. Defendant argues that the trial court abused its discretion and committed error requiring reversal when it allowed Johnson to relate Hill's statements, "[t]hat mother f----- left me," and "if you don't want to be with me, why are you here," under the excited utterance hearsay exception. At trial, defendant failed to object to Johnson's testimony that Hill told defendant that she was seeing someone else. Thus, defendant failed to properly preserve his argument that the trial court erred when it failed to suppress this testimony. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). However, defendant properly preserved his argument that the trial court abused its discretion when it

allowed Johnson to relate two different statements made by Hill under the excited utterance exception because he raised it before the trial court, and the trial court considered it. *Id.*; *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

We review preserved claims regarding the trial admission of testimony for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We review unpreserved claims for plain error which affects a defendant's substantial rights, and merits reversal only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999); *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003). Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. MRE 802; *Tanner*, *supra* at 629. A statement that is offered to show that it was made or to show its effect on the listener is not hearsay. *People v Moorer*, 262 Mich App 64, 71; 683 NW2d 736 (2004).

The prosecutor did not offer Johnson's testimony that Hill told defendant she "met someone else," to prove that Hill had actually met someone else. Thus, the prosecutor did not offer the testimony to prove the truth of the matter asserted. Rather, the prosecutor offered this testimony to show that defendant, who was involved in a romantic relationship with Hill, was aware that Hill had met someone else. And that jealousy created by that information could have created a possible motive to kill Hill. Because the prosecutor offered the testimony to show the possible effect of the information on defendant and not to prove the truth of the matter asserted, the testimony was not hearsay. *Moorer*, *supra* at 71. The trial court did not commit plain error by failing to sua sponte suppress the statement. *Carines*, *supra* at 763. And, because the testimony was not hearsay, any objection to the testimony would have been futile, and defendant's claim that he was denied his right to the effective assistance of counsel when defense counsel failed to object to the testimony fails. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003)

Further, a hearsay statement is admissible as an excited utterance if a declarant made the statement while excited by a startling event. MRE 803(2); *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The declarant must have made the statement before there was time to contrive and misrepresent, and must have related to the circumstances of the startling event. *Id*. at 550-551. The lack of capacity to fabricate in the time provided is the focus. *Id*. at 551-552. Although the time that passed between the startling event and the utterance is relevant in determining whether the declarant was still under the stress of the event, it is not dispositive, and it is necessary to consider whether there was a plausible explanation for the delay. *Id*. Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is minimal. *Id*. at 552. A trial court's determination whether the declarant was still under the stress of the event is given wide discretion. *Id*. Furthermore, to admit hearsay evidence under the excited utterance exception, there must be some independent proof, direct or circumstantial, that the startling event occurred. *People v Kowalak*, 215 Mich App 554, 559; 546 NW2d 681 (1996).

Johnson testified that she heard someone banging hard on the door. She looked through the peephole and saw Hill who looked very angry and was crying. Hill stated, "[t]hat mother f---- left me." The trial court allowed the aforementioned testimony under the excited utterance hearsay exception. The evidence showed that on the night in question, defendant and Hill left the house together around 11:15 p.m. in a car belonging to a friend of defendant. A couple of hours later, defendant returned to the residence alone. About 15 minutes later Johnson heard the banging on the door and discovered Hill beating hard on the front door because she was locked out. When Johnson came to the door to let Hill in, Hill spontaneously made the objected to statement.

The circumstantial evidence presented establishes that defendant physically left Hill somewhere without a key to get back into the house. *Kowalak, supra* 559. The evidence also establishes that Hill was crying, appeared upset, and used an expletive to refer to defendant. And the statement referred to the circumstances of the startling event of defendant leaving Hill somewhere. The trial court did not abuse its discretion when it found that Hill was still under the stress of the startling event when she arrived home after defendant left her somewhere in the middle of the night without a key to get back into her residence and when it allowed Johnson's testimony into evidence under the excited utterance hearsay exception. MRE 803(2); *Smith, supra* at 550-552; *Kowalak, supra* at 559.

Johnson also testified that after Hill entered the residence, and defendant and Hill began arguing, Johnson heard Hill state, "if you don't want to be with me, why are you here." The trial court, likewise, allowed this testimony into evidence under the excited utterance hearsay exception. More appropriately, the statement was admissible as part of the res gestae because it relates the then-existing mental or emotional state of the declarant. See MRE 803(3); *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996); *People v Jones*, 38 Mich App 512, 515-516; 196 NW2d 817 (1972). In addition, considering the entire record, any such error is harmless. The harmless error doctrine presumes that a preserved, nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it was more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

Evidence on the whole record showed that after defendant and Hill argued for a few minutes in a bedroom, Johnson heard a gunshot and then observed defendant walk out of Hill's room, shut the door slowly, walk down the hallway, and leave out the front door. Johnson then saw Hill lying in a pool of blood. When police arrested defendant, officers found a spent shotgun shell in defendant's left coat pocket. Gunshot residue tests revealed defendant either fired a gun or was in close vicinity to a gun that was fired. And, a transcript of a phone call revealed that defendant told his wife, "I done did something I wasn't supposed to do in taking somebody's life." Again, after a review of the entire record, the trial court's error in admitting the testimony "if you don't want to be with me, why are you here" under the excited utterance hearsay exception was harmless and does not require reversal. *Lukity, supra* at 496.

Defendant next argues that the trial court committed error requiring reversal when it admitted defendant's answers to standard questions asked during the administration of the gunshot residue test because police had not read defendant his *Miranda*[1] rights. We review preserved claims regarding the proper admission of testimony for an abuse of discretion. *Starr, supra* at 494. Generally, the prosecutor may not use custodial statements as evidence unless he demonstrates that, before any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000).

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384, 395; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A custodial interrogation is questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances. *Id*. The key question is whether the accused could reasonably believe that he was not free to leave. *Id*. The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Id*. Police conduct constitutes interrogation triggering *Miranda* when the police knew or reasonably should have known that their conduct was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his right to silence and his right to counsel. *Daoud, supra* at 632-634.

Here, Officer Bill Niarhos, an evidence technician for the Detroit Police Department, conducted a gunshot residue test on defendant. Niarhos conducted the test at approximately 6:10 a.m. on the day of the incident by swabbing defendant's "left web," "right web" and forehead, and by asking defendant the required standard checklist questions. At trial, Niarhos began to read the questions that he asked defendant, followed by defendant's answers to the questions. Niarhos specifically stated that defendant told him that he was not fingerprinted before Niarhos conducted the residue test, that he was handcuffed before the residue test was conducted, that he did not wash his hands before the residue test was conducted, and that he was not in possession of a firearm.

Because police had arrested defendant and taken him to the police station at the time Niarhos conducted the test, defendant could not have felt free to leave. Thus, defendant was in custody. *Zahn, supra* at 449. Police had just arrested defendant for a crime involving a gunshot wound, therefore, Niarhos's questions to defendant regarding whether he had possessed a firearm, etc., were likely to invoke incriminating responses. Plainly, Niarhos's questions triggered defendant's *Miranda* rights. *Anderson, supra* at 532-533. Niarhos testified that he did not read defendant his *Miranda* rights, and there is no evidence on the record that defendant

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

waived his *Miranda* rights, the trial court should not have admitted defendant's statements to Niarhos into evidence. *Daoud, supra* at 632-634. But, this error does not require reversal.

The error does not require reversal because, when asked, defendant told Niarhos that he had not possessed a firearm. Further, defendant's statements that he was not fingerprinted, did not wash his hands, and was handcuffed before the residue test was administered did not factor in the outcome of this case. And, after reviewing the multitude of evidence in this case, it is clear beyond a reasonable doubt that the jury would have convicted defendant absent the trial court's admission of the challenged statements and therefore, any error in allowing the testimony into evidence was harmless and does not require reversal. *Lukity, supra* at 496.

Finally, defendant asserts that he was denied his constitutional right to a fair and impartial trial when the prosecutor vouched for Johnson's credibility. We review claims of prosecutorial misconduct on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Id*. at 438. A prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness, but he may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Furthermore, a prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor's remarks are reviewed in context to determine whether the defendant was denied a fair trial, including consideration of the remarks in light of defense arguments. *Ackerman, supra* at 452. An otherwise improper remark may not constitute an error requiring reversal if responsive to defense counsel's argument. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

During defense counsel's closing argument, defense counsel attacked Johnson's credibility by suggesting that Johnson was biased and had a motive to see that defendant was punished because she had just lost a loved one. Defense counsel also proposed that Johnson embellished her testimony so that she could get revenge on defendant for his accidental actions. During the prosecutor's rebuttal, she responded to defense counsel's remarks and told the jury that it was its job to decide who was telling the truth. The prosecutor asked the jury to use its common sense and listen to the judge's credibility instruction when determining whose testimony it believed. The prosecutor then went on to use the evidence provided and specific examples of how Johnson reacted while she testified to support the prosecutor's argument that it was likely that Johnson was telling the truth.

Taking the prosecutor's rebuttal argument as a whole in the context of responding to defense counsel's attack on Johnson's credibility, we conclude that the prosecutor did not imply that she had some special knowledge of Johnson's truthfulness. Instead, she properly responded to defense counsel's attack on Johnson's credibility by telling the jury to follow the judge's credibility instruction, and arguing that the evidence established Johnson was a credible witness. The prosecutor's rebuttal comments do not amount to improper vouching. *Thomas, supra* at 455; *Howard, supra* at 548. In any event, the challenged comments do not warrant reversal because the trial judge specifically instructed the jurors that it was their duty to determine the

credibility of witnesses and that the lawyers' statements and arguments should not be considered evidence. The comments do not amount to prosecutorial misconduct and defendant was not denied a fair and impartial trial as a result of the comments. *Watson, supra* at 586; *Rice, supra* at 435.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio